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Supreme Court, U.S.
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No. 07-106

IN THE

Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK) a District of Columbia Corporation; UNION PACIFIC RAILROAD CORPORATION,

Petitioners,

- against -

CURTIS BURROWS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Missouri courts' rulings and jury instructions concerning the speed of an Amtrak passenger train as it approached a Union Pacific work crew at a speed authorized by 49 C.F.R. § 213.9(a) violated the federal preemption requirements of 49 U.S.C. § 20106 and *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), which holds that state common law tort claims based on excessive train speed are preempted at least in the absence of a duty to slow or stop a train to avoid a specific, individual hazard.

PARTIES INVOLVED AND RULE 29.6 STATEMENT

All parties below are named in the caption. Petitioner National Railroad Passenger Corporation, a corporation providing intercity passenger rail service, has no parent company. However, American Premiere Underwriters, Inc. and Burlington Northern Santa Fe Railroad Company own 10% or more of this Petitioner's stock. The parent corporation of Petitioner Union Pacific Railroad Company is Union Pacific Corporation, which is a publicly-held company and the only such company that owns 10% or more of the stock of this Petitioner.

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2007

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK); UNION PACIFIC RAILROAD CORPORATION,

Petitioners,

v.

CURTIS BURROWS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

PETITION FOR WRIT OF CERTIORARI

Petitioners, National Railroad Passenger Corporation ("Amtrak") and Union Pacific Railroad Corporation ("Union Pacific") (collectively "Petitioners"), respectfully request that a writ of certiorari issue to review the opinion of the Missouri Court of Appeals, Eastern District, which affirmed a judgment of the Missouri trial court (Circuit Court of the City of St. Louis).

OPINIONS BELOW

The Missouri trial court's judgment, as amended, is reproduced at A.4a.[1] The opinion of the Missouri Court of Appeals, Eastern District, dated January 23, 2007, is reported at 218 S.W.3d 527 and is reproduced at A.6a. The order of the Missouri Court of Appeals, Eastern District, dated March 6, 2007, denying Petitioners' motion for rehearing and their application to that Court for transfer to the Missouri Supreme Court is unreported and is reproduced at A.27a. The order of the Missouri Supreme Court, dated May 1, 2007, denying Petitioners' application for transfer to the Missouri Supreme Court is unreported and is reproduced at A.28a.

JURISDICTION

The trial court entered judgment on the jury verdict on August 26, 2005 and amended the judgment on November 21, 2005. A.1a; A.4a. The Missouri Court of Appeals, Eastern District, affirmed the trial court's judgment, as amended, in an opinion issued on January 23, 2007. A.6a. Petitioners' timely motion in the Missouri Court of Appeals, Eastern District, for rehearing and their timely application to that Court for transfer to the Missouri Supreme Court was denied on March 6, 2007. A.27a. Petitioners' timely application to the Missouri Supreme Court to transfer the action to the Missouri Supreme Court for

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1 "A. ___" refers to the Appendix to this Petition for Writ of Certiorari.

further review was denied by that Court on May 1, 2007. A.28a. This Court has jurisdiction pursuant to 28 U.S.C. §1257.

STATUTES AND REGULATIONS INVOLVED

The statute at issue is the Federal Railroad Safety Act of 1970, 49 U.S.C. §§ 20101 - 20153 ("FRSA"), and more specifically, 49 U.S.C. § 20106. Section 20106 of Title 49 provides as follows:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State Requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order
>
> (1) is necessary to eliminate or reduce an essentially local safety hazard;
>
> (2) is not compatible with a law, regulation, or order of the United States Government; and
>
> (3) does not unreasonably burden interstate commerce.

A.30a.

Applicable regulations promulgated pursuant to the FRSA are found at 49 C.F.R. §§ 213.9(a) and 213.11. A.31a; A.33a. Section 213.9(a) of these regulations provides, *inter alia*, that the maximum allowable speed on a Class 4 track for passenger trains is eighty miles per hour. A.31a. Section 213.11 of these regulations requires continuous supervision of a track that is under traffic conditions and undergoing restoration or renewal. A.33a.

STATEMENT OF THE CASE

The Missouri courts' rulings and jury instructions in this case flout the federal preemption requirements established by 49 U.S.C. § 20106 and this Court's decision in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993) ("*Easterwood*"). *Easterwood* held, inter alia, that the FRSA preempts a plaintiff's state tort claim that a train was traveling too quickly given the "time and place" where the train was operating within the federally-mandated maximum speed limit set forth in 49 C.F.R. § 213.9. *Easterwood*, 507 U.S. at 675-76 and n.15. In so holding, this Court did not address whether or to what extent the FRSA would preempt a "related" claim involving "the duty to slow or stop a train to avoid a specific, individual hazard." *Id.* at 676, n. 15. Nor has this Court addressed the boundaries or preemptive effect of a "specific, individual hazard" in the fourteen years since *Easterwood*.

As discussed below, the Missouri courts may have professed to pay modest lip service to 49 U.S.C. § 20106 and

Easterwood, but their rulings and instructions in this case run roughshod over *Easterwood*'s holding, the FRSA's preemptive reach and the federal statute's fundamental goal -- establishing uniform federal standards for railroad safety.

On September 23, 2003, Respondent Curtis Burrows ("Respondent" or "Burrows"), a Union Pacific employee, who was part of a track repair work crew, was injured when a scheduled Amtrak passenger train struck his hand, throwing him to the ground, as the Amtrak train proceeded past him on a mainline track immediately adjacent to the track on which the repair crew was working. A.7a-8a; Tr.253, 522. Union Pacific work crews had been working on sections of this track for some seven or eight months before the accident, during which time they were protected by Union Pacific's Form B flag protection procedures from all passing trains, including scheduled Amtrak trains operating three to four times each day on the adjourning track. Tr. 236, 238, 300, 311, 395.

It is indisputable that on the accident date the Amtrak train was operating at relevant times within the federally-mandated eighty miles per hour speed limit and proceded pursuant to Union Pacific's established Form B flag protection procedures. A.8a; Tr. 268, 299-300, 306-07, 310, 331-39, 393, 445, 448-50. Before proceeding into the protected work zone, the Amtrak train was required to stop until it obtained specific clearance to proceed at maximum speed by the responsible Union Pacific employee-in-charge, who first communicated with the Union Pacific work crew members to confirm that they would be clear of the oncoming Amtrak train's path. Tr. 332-39, 346-47. Moreover, after proceeding into the protected

work zone, the Amtrak train engineer complied with applicable rules by constantly blowing the train's horn from the moment the engineer first saw the track repair crew and equipment about 2,500-2,600 feet before the train reached Burrows' location. A. 8a; Tr. 410, 430, 434-36, 442-43.

Just before being struck, Burrows was standing between Union Pacific track no. 1 and the adjoining track no. 2; according to an eyewitness, he stepped back from the tamper equipment with which he was working just as the Amtrak train came past, and it struck his hand, "literally like hittin' a baseball." Tr. 253, 269, 522. The accident happened "just that quick" after Burrows stepped back. Tr. 269. Burrows was facing away from and did not not see or hear the approaching train. A.8a; Tr. 521. Burrows' fellow Union Pacific employee later admitted that he totally forgot to tell Burrows about the oncoming train, as Union Pacific's Form B flag protection procedures required him to do. Tr. 239, 321, 339.

Respondent brought suit against Union Pacific and Amtrak in the Circuit Court of the City of St. Louis, Missouri. His petition alleged, *inter alia*, that Amtrak breached a state common law duty in tort because "its train was operating at a speed excessive for the conditions then and there existing." Respondent's Petition, dated Nov. 25, 2003, at ¶3(c). Respondent also alleged that Union Pacific breached a duty under the Federal Employers' Liability Act, 45 U.S.C. §§51-60 (2000), in part, by failing to provide Respondent with a safe place to work. *Id.*, at ¶5. The jury trial resulted in $5,000,000 compensatory damage award in favor of Respondent and against Petitioners. A.1a.

A. Trial Court Proceedings

Before trial, Petitioners filed a motion for summary judgment in favor of Amtrak, asserting, *inter alia*, that the FRSA, as applied by this Court in *Easterwood*, preempted Respondent's common law action based on excessive train speed and that the undisputed evidence demonstrated that the train was always operating within the federally-mandated speed limit. Petitioner's Motion for Summary Judgment, dated May 19, 2005, at ¶3. Petitioners also filed a motion in limine to exclude evidence of the train's speed, citing the same governing legal authority and undisputed evidence. Petitioner's Motion *In Limine*, dated Aug. 22, 2005, at pp. 1-3. At the start of trial, the court denied Amtrak's summary judgment motion without explanation and initially reserved decision on, and later denied, Amtrak's *in limine* motion regarding speed evidence. Tr. 17; Tr. 474.

Before trial started, Union Pacific offered to admit liability for Respondent's injuries due to the accident. The trial court nevertheless permitted Respondent to reject this admission and try his liability case to verdict against Union Pacific. Tr. 203. Amtrak did not offer to admit liability because Respondent was pursuing a punitive claim against it. Tr. 4.

At trial, Respondent's theory of liability prominently featured the claim that the accident happened because Amtrak's train proceeded into the protected work zone at an excessive speed, a claim that should have been preempted based on the undisputed fact that the train's speed complied at

all times with the federally-mandated speed standard. In his opening statement, Respondent's counsel accused the railroads of "hav[ing] operations going on in this construction zone at high speed right next to where [Burrows] was working." Tr. 199. According to Respondent, "Union Pacific partnered with Amtrak" and took "steps to make sure that Amtrak trains got through fast and that they were not delayed." Tr. 210. Respondent told the jury that Amtrak "purposely and intentionally obligated Union Pacific to allow it to come through at higher rates of speed than its freight trains, to remove slow orders that train maintenance supervisors had deemed necessary for the safety of these workers, so that [Amtrak] could make up time, so that their trains wouldn't be late." Tr. 211. Respondent's counsel insisted that "this train was running late and . . . [there was] a corporate philosophy to make up time to get the train to the station on time at all costs." *Id.* Respondent's counsel also accused Amtrak's train engineer of accelerating the train after he first saw the work crew, which Respondent's counsel characterized as an Amtrak "policy that you don't stop a train, in fact you accelerate" because "Amtrak recognizes that it would lose profits if it continued to have delays." Tr. 213, 215.[2]

Respondent trumpeted this federally-preempted liability theme that Amtrak proceeded too quickly through the protected work zone again and again during trial.

---

2 Evidence at trial would show that even though the train's recorded speed accelerated in the work zone from sixty-six miles per hour up to about seventy-three miles per hour after the engineer first saw the work crew, the throttle position remained the same; the engineer did not consciously increase the train's speed. Tr. 439-440.

During the direct case, evidence was introduced that Union Pacific had established Form B flag protection procedures to protect the Union Pacific crews that had been working on this track for seven or eight months. Tr. 301-02, 331-39. The procedures required every train to stop well in advance of the crew and await instructions clearing the train to proceed through the protected work zone. Tr. 332. Although all other trains were cleared to proceed through the work zone at forty miles per hour, Amtrak's passenger trains were allowed to travel through the zone at seventy to seventy-five miles per hour (which was still well within the FRA-mandated maximum speed limit). Tr. 304-306, 309, 331-332.

Respondent's attorney, for example, questioned a Union Pacific assistant foreman, Dalan Cushman, as follows:

> Q: And in your opinion based on your experience and out of an obligation for the safety of the workers who are under your supervision, did you determine that Union Pacific should slow its freight trains down to 40 miles per hour in this work zone?
>
> A: Yes, per the rules.
>
> Q: According to the rules, right?
>
> A: Yes.
>
> Q: And do you agree that there are safety

> hazards to which track workers are exposed when Amtrak passenger trains go down at a high rate of speed on the adjacent track?
>
> A: Yes, in my opinion.

Tr. 301. Respondent also elicited testimony that Cushman had recommended about a month before the incident that Amtrak should be required to reduce the speed of its trains through the work zone to forty miles per hour but the witness was ordered to clear Amtrak trains through "at maximum speed" -- that is, seventy to seventy-five miles per hour. Tr. 301-06, 315-16. For example:

> Q: Under Union Pacific's own rule and the language that they choose, if work will continue while trains are passing on the adjacent track, the speed of trains must not exceed 40 miles per hour. Isn't that the way the rule reads?
>
> A: That's the way the rule reads.
>
> Q: And on the date of this incident Amtrak was going much faster than 40 miles per hour on the tangent track when it came by and swiped Curtis Burrows?
>
> A: Yes, he was cleared at a maximum.

Tr. 309. To drive home the explanation for why the Amtrak trains were cleared to proceed through the work zone at much faster speeds, Respondent also elicited testimony from Cushman that if Amtrak got behind schedule due to slow orders, Union Pacific was bound by agreement to help "get Amtrak trains caught up with their schedule." Tr. 314-15.

During Cushman's testimony, the trial court denied Petitioners' objection to his testimony about the Amtrak train's speed, Tr. 302, and denied Petitioners' motion to strike Cushman's entire testimony as prejudicial. Tr. 330.

Respondent pressed the same federally-preempted liability theme with an Amtrak witness, Scott Kenner, who supervised the Amtrak train's operating crew. Respondent elicited testimony from this Amtrak employee that Union Pacific could have limited Amtrak train speed to twenty-five or forty miles per hour through the work zone "if it deemed it appropriate." Tr. 378. Instead, however, the Amtrak train was about thirty minutes behind schedule as of the time of the incident; and Union Pacific helped the Amtrak train make up for earlier delays by allowing it go seventy to seventy-five miles per hour through the work zone rather than requiring the train to comply with the forty miles per hour speed restriction imposed on Union Pacific's own trains. Tr. 378-79, 381.

Thereafter, before Respondent read deposition testimony of two fact witnesses, the trial court specifically denied Petitioners' objections to questions concerning the speed of the Amtrak train through the work zone. Tr. 471-74. In response to one of Amtrak's objections, Respondent's

counsel offered the following tortured excuse for evading the federal speed preemption requirement:

> [W]e do not intend to submit a claim against Amtrak on the basis of speed [but] [t]he evidence of speed is relevant to show corporate policy which trickles down to the engineer and the train operations crews such that they operate first and foremost with the priority of making up for lost time . . . .

Tr. 471-72. And when the trial court shortly thereafter formally denied Petitioners' *in limine* motion on the speed issue, it merely offered the following cryptic justification for allowing all the speed evidence: "while the issue of speed is preempted by federal law, it's not speed per se that's being discussed in this trial." Tr. 474.

At the close of Respondent's direct case, the trial court directed verdict dismissing his punitive damage claim against Amtrak. Tr. 848. Like Union Pacific, Amtrak then offered to admit liability, but Respondent rejected the admission and the court allowed Burrows to proceed with his liability case to verdict against both Amtrak and Union Pacific. Tr. 848, 911.

During closing argument, Respondent's counsel again drove home the federally-preempted theme that Amtrak's train was going too fast through the protective work zone -- notwithstanding the undisputed fact that the train's speed met applicable federal speed standards. Counsel argued that Amtrak "got special treatment" and "didn't have to abide by

slow orders even though the same hazard was present out there at this specific location where track workers were placed in harm's way." Tr. 938.

Moreover, even though there was no punitive damage claim remaining in the case, Respondent used the speed issue as an excuse to charge that Petitioners were simply callous, money-hungry corporations. Amtrak, according to Respondent's counsel, should not have been "pressuring Union Pacific to lift these slow orders" and had acted like it had no "further responsibility . . . for the safety of track workers" once its train received clearance to proceed into the protective work zone. *Id.* Blaming Amtrak's "corporate mission, of trying to make a profit," Respondent's counsel contended that "not only did [the engineer] not slow down . . . when he first started seeing [Burrows] but he sped up," and "merely sound[ed] the horn . . . ." Tr. 939-40. According to Respondent's counsel, Amtrak's operating crew instead "should [have] stop[ped] the train immediately because the horn is not going to do any good." Tr. 941-42. Over objection, Respondent's counsel told the jury that "[w]hat it comes down to is these two companies were more concerned about their profits than they were about safety . . . ." Tr. 943

Over Petitioners' objections, the trial court gave the following instructions bearing on the issue of Petitioners' negligence and train speed:

> Your verdict must be for . . . [Respondent] if you believe: . . . Union Pacific either failed to provide reasonably safe conditions for work, or

> reasonably safe equipment . . . .(Instruction No. 6).[3]
>
> . . . .
>
> Your verdict must be for . . . [Respondent] if you believe: . . . [Amtrak] knew or by the use of the highest degree of care could have known that there was a reasonable likelihood of collision in time thereafter to have stopped or slacken speed, but failed to do so . . . . (Instruction No. 7; *see* A.20a-21a)
>
> . . . .
>
> The speed of the Amtrak train in this case is governed by federal regulations. You are instructed that the train in this case was operating within that speed limit. The only claim you can consider against . . . Union Pacific . . . is contained in Instruction No. 6. The only claim you can consider against . . . [Amtrak] is contained in Instruction No. 7. (Instruction No. 8; *see* A. 21a.)

In addition, the trial court refused Petitioners' proposed Instruction No. D, which read:

> The speed of the Amtrak train in this case is governed by federal regulation. You are

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3 The complete Jury Instructions, including the Petitioners' proposed instructions that the trial court refused to give, were filed in the Missouri Circuit Court Auguast 26, 2005.

> instructed that the train in this case was operated within that speed limit and that there can be no liability on the part of Amtrak in this case with reference to the speed at which the train was traveling before and at the time of the occurrence.

The jury found both Union Pacific and Amtrak liable and awarded Respondent $5 million in compensatory damages. A.1a.

In post-trial motions, Petitioners contended, in part, that federal preemption expressly barred evidence or argument that the Amtrak train was traveling at an excessive speed or that it failed to stop or slow the train prior to the collision. Petitioner's Motion for New Trial, dated Sept. 23, 2005, at ¶ 14, pp. 10-12. Petitioners also argued that based on the preemptive effect of the federal regulations governing the train's speed the trial court gave an erroneous instruction concerning Amtrak's negligence. *Id.*, at ¶ 18, p. 13. Petitioners further asserted that the trial court erred in denying a mistrial motion based on Respondent's contention in closing argument that Petitioners were more interested in profits than safety. *Id.*, at ¶ 7, p. 8. On November 21, 2005, the trial court denied Petitioners' post-trial motions and entered an amended judgment for $5,275,301.92. A.4a.

B. The Appeal

Petitioners appealed to the Missouri Court of Appeals, Eastern District, challenging the jury award on the grounds,

interalia, that the trial court misapplied federal law in allowing Respondent to present evidence of the train's speed. Citing this Court's holding in *C.S.X. Transportation, Inc. v. Easterwood*, 507 U.S. 658, Petitioners complained about the trial court's admission of evidence concerning train speed and its jury instructions on this subject, contending that the trial court failed to apply the governing federal speed preemption requirements. Appellants' Brief in Missouri Court of Appeals served May 12, 2006, ("App. Brief") at 45-48. Petitioners also objected to Respondent's inflammatory arguments about Petitioners' purported concern for profits rather than safety. App. Brief at 30-34.

The Missouri Court of Appeals, Eastern District, in its opinion issued January 23, 2007, rejected Petitioners' arguments and affirmed the trial court judgment as amended. A.6a-26a. The Court of Appeals reasoned that Respondent's evidence concerning speed was not preempted by federal law because *Easterwood* "merely holds that federal law preempts a state common law 'negligence action only insofar as it asserts that [a defendant's] train was traveling at an excessive speed." A.22a (citing *Easterwood*, 507 U.S. at 676.) (emphasis in original). In addition, the appellate court concluded that Respondent had claimed "that the Amtrak train failed to stop or slacken its speed in response to a specific, individual hazard," and that "this claim is not preempted by federal law and is cognizable." A.22a. To support this latter conclusion, the appellate court asserted that it was "uncontroverted" that Respondent was standing on the railroad tracks at the time of the collision with the Amtrak train. *Id.* The appellate court added that the jury instructions concerning Amtrak did not

permit the jury "to find Amtrak merely liable for traveling too quickly considering the time and place." *Id.*

The Missouri Court of Appeals also rejected Petitioners' objections regarding Respondent's closing argument. The appellate court concluded that Respondent was entitled to attack Petitioners' unwillingness to accept corporate responsibility because of Petitioners' "failure to control the speed of the Amtrak train" when they allowed the Amtrak train to travel through the construction zone at a speed exceeding seventy miles per hour even though "Union Pacific train speed was limited to forty miles per hour in order to protect track worker safety." A.13a-14a. Similarly, the appellate court found no fault with Respondent's argument that Petitioners were "more concerned about their profits than they were about safety" because of the evidence that the Amtrak train was thirty minutes behind schedule and the engineer accelerated his train speed from sixty six miles per hour to seventy-three miles per hour after he saw Respondent "on the track." *Id.*

Petitioner moved for rehearing and also made an application in the Missouri Court of Appeals to transfer the case to the Supreme Court of Missouri because it raised numerous questions of general importance. These submissions addressed, *inter alia*, the question of whether the Missouri Court of Appeals erred in permitting speed evidence based on the specific, individual hazard exception to the federal preemption bar. Motion for Rehearing, filed Feb. 7, 2007, pp. 4-5; Application for Transfer, filed Feb. 7, 2007, at pp. 2-3. The Missouri Court of Appeals denied Petitioners' rehearing motion and their application to transfer on March 6, 2007.

A.27a. Petitioners then made a similar application to transfer in the Missouri Supreme Court. *See* Petitioners' Application to Transfer, filed March 21, 2007, pp. 1, 8-11. That application was denied by the Missouri Supreme Court on May 1, 2007. A.28a.

REASONS FOR GRANTING THE WRIT

The Missouri courts' rulings and instructions in this case clearly undermine this Court's directive that excessive speed claims under state common law must be preempted by 49 U.S.C. § 20106 based on the maximum train speed regulations set forth in 49 C.F.R. § 213.9(a), which cover "the subject matter of train speed with respect to track conditions." *Easterwood*, 508 U.S. at 675. The Missouri courts violated 49 U.S.C. § 20106 and *Easterwood* in two ways: (1) although federal speed preemption may not preclude a state common law claim that Petitioners owe a duty to slow down or stop because of a "specific, individual hazard," the presence of a track repair crew, which is a very common occurrence on the railroad, is definitely not such a hazard; and (2) the Missouri courts relied, in part, on a nonsensical argument that even though speed preemption may bar a claim based on excessive train speed, that does not bar evidence and argument regarding that very subject.

I. THE MISSOURI COURTS VIOLATED 49 U.S.C. § 20106 AND *EASTERWOOD* BY MISAPPLYING THE NARROW "SPECIFIC, INDIVIDUAL HAZARD" CONCEPT

As applied by this Court in *Easterwood*, 49 U. S. C. § 20106 expressly preempts all state common law negligence claims where the subject matter of those claims are substantially subsumed by federal regulations promulgated by the Secretary of Transportation, acting through the Federal Railroad Administration ("FRA"). *CSX Transp., Inc. v. Easterwood*, 507 U.S. at 675. *Easterwood*'s holding gives necessary vitality to Congress' express goal in enacting the FRSA -- promoting safety in every aspect of railroad operations by establishing uniform federal standards related to railroad safety to the extent practicable. *Id.*, at 661-62 and n. 2 (citing what is now codified at 49 U.S.C. §§20101 and 20106); *see also Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 347-48 (2000).

In *Easterwood*, this Court specifically held that the FRA regulations contained in 49 C.F.R. § 213.9, which set maximum speed limits for trains based on the class of track, "cover [ ] the subject matter of train speed with respect to track conditions" and therefore preempt state common law tort claims asserting the train was traveling too fast given the time and place it was operating. *Easterwood*, 507 U.S. at 675-76 and n. 15.

In this case, the Missouri courts latched onto an issue which this Court acknowledged in *Easterwood*, but did not need to decide -- whether and to what extent this federal speed preemption requirement gives way when the train engineer traveling within the FRA - mandated speed limit is confronted by a "specific, individual hazard" that may impose a common

law "duty to slow or stop a train" to avoid this hazard. *Id.*, at 675, n.15. This Court distinguished this "specific, individual hazard" claim from a preempted claim under state common law that the train's speed was excessive given the "time and place" where it was operating. *Id.*, at 675-76 and n.15.

Since *Easterwood,* this Court has not had occasion to consider the boundary line that separates a preempted "time and place" common law tort claim based on excessive train speed from one based on a "specific individual hazard," let alone to decide whether or when a "specific individual hazard" removes a state common law tort claim from the express preemptive reach of 49 U.S.C. § 20106.[4]

Since *Easterwood*, numerous federal and state courts have examined the boundaries of a "specific individual hazard." Well-reasoned decisions make clear that a "specific

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4 The preemption requirement of 49 U.S.C. § 20106 contains a statutory savings clause that allows a state to adopt or continue in force an additional or more stringent law, regulation or order related to railroad safety that, among other things, "is necessary to eliminate or reduce an essentially local safety . . . hazard." 49 U.S.C. § 20106. Although some lower court decisions do not distinguish between the statutory phrase "essentially local safety hazard" and this Court's reference to a "specific, individual hazard" in *Easterwood,* well-reasoned decisions conclude that the two concepts must be different and the statute's reference to an "essentially local safety hazard" only covers state laws, regulations or orders that specifically address a particular local hazard, not a general common law tort claim, which is merely a general rule to address all hazards caused by a lack of due care. *See, e.g., Hightower v. Kansas City S. Ry. Co.,* 70 P.3d 835, 846-47 (Okla. 2003); *Myers v. Missouri Pac. R. Co.,* 52 P. 3d 1014, 1024-28 (Okla. 2002); *Baker v. Canadian Nat'l/Ill. Cent. Ry. Co.*, 397 F.Supp. 2d 803, 813 (S.D. Miss. 2005).

individual hazard" must refer to a transient or aberrational condition that the Secretary of Transportation, through the FRA, could not have taken into account in promulgating a uniform national standard for maximum train speeds. Thus, one court has aptly described a "specific, individual hazard" as

> a person, vehicle, obstruction, object or event which is not a fixed condition or feature . . . and which is not capable of being taken into account by the Secretary of Transportation in the promulgation of uniform, national speed regulations [footnote omitted]. In short, a specific, individual hazard refers to a unique occurrence which could lead to a specific collision and not to allegedly dangerous conditions at a particular [fixed location].

Myers v. Missouri Pac. R. Co., 52 P.3d 1014, 1026-27 (Okla. 2002); *see also O'Bannon v. Union Pac. R.R. Co.*, 960 F. Supp. 1411, 1420-21 (W.D. Mo. 1977) (A specific individual hazard "must be [an] aberration [ ] which the Secretary of Transportation could not have considered when determining train speed limits" and cannot be a hazard that was "capable of being adequately encompassed within uniform, national standards"), *aff'd*, 169 F.2d 1088 (8th Cir. 1999); *Seyler v. Burlington N. Santa Fe Corp.*, 102 F. Supp.2d 1226, 1236 (D. Kan. 2000) (quoting *O'Bannon*); *Cox v. Norfolk & W. Ry. Co.*, 998 F.Supp. 679, 685 (S.D.W. Va. 1998) (quoting *O'Bannon*); *Price v. National R.R. Pass. Corp.*, 14 P.3d 702, 707-08 (Utah Ct. App. 2000 (the specific, individual hazard must be "so unusual that the Secretary of Transportation could not have considered [it] in making a determination of train speed limits

under the FRSA") (quoted citation omitted), *cert denied*, 26 P.3d 235 (Utah 2001).

Numerous lower court decisions have described a "specific, individual hazard" as the presence of a person or vehicle standing on the tracks. *See, e.g. Seyler* 102 F.Supp. 2d at 1236; *O'Bannon*, 960 F.Supp. at 1420 and n.10; *Herriman v. Conrail, Inc.*, 883 F.Supp. 303, 307 (N.D. Ind. 1995); *Bashir v. National R.R. Pass. Corp.*, 929 F.Supp. 404, 412 (S.D. Fla. 1996); *Largo v. Atchison, Topeka and Santa Fe Ry. Co.*, 41 P.3d 347, 354 (N. Mex. 2001). This does not mean, however, that an engineer has a common law duty to brake immediately upon seeing someone or something on or near the tracks. Quite the contrary, a common law duty to slow down or stop may arise only when there is a specific and imminent threat of collision with that person or object. *See, e.g., Baker v. Canadian Nat'l/Ill. Cent. Ry. Co.*, 397 F.Supp.2d at 813-14; *Liboy v. Rogero*, 363 F.Supp. 2d 1332, 1340 (M.D. Fla. 2005); *Anderson v. Wisconsin Cent. Transp. Co.*, 327 F.Supp. 969, 978 (E.D. Wisc. 2004); *Herriman*, 883 F.Supp. at 307; *Myers v. Missouri Pac. R. Co.*, 52 P.3d at 1028.[5]

There are two reasons why a "specific, individual hazard" must be narrowly limited to a circumstance in which a collision with a specific person or object on the tracks is imminent. First, it is a settled doctrine of railroad law that

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5 It merits observation that under Missouri common law, a train engineer only owes a duty to exercise ordinary care to discover someone in "imminent peril" on the tracks in sufficient time thereafter to prevent striking that person. *Mayfield v. Kansas City. S. Ry. Co.*, 85 S.W.2d 116, 125 (Mo. 1935)

when an engineer blows the train horn to warn someone on or approaching a railroad track, the engineer has the legal right to assume that the person will take reasonable precautions to get out of the way of the approaching train and, thus, the engineer is not under an immediate duty to slow or stop the train. *See, e.g., Andrews v. Metro North Commuter R.R. Co.*, 882 F.2d 705, 709-10 (2d Cir. 1989); *Powers v. Union Pac. R.R. Co.*, 655 F.2d 1380, 1384 (9th Cir. 1981); *Box v. South Georgia Ry. Co.*, 433 F.2d 89, 92-93 (5th Cir. 1970); *Cagle v. Norfolk S. Ry.*, 242 F.2d 405, 407-08 (4th Cir. 1957); *Kowaleski v. Pennsylvania R.R. Co.*, 103 F.2d 827, 829 (3d Cir. 1939); *Liboy*, 363 F. Supp. 2d at, 1341; *Largo*, 41 P. 3d at 355; *Price*, 14 P.3d at 708 (Utah Ct. App. 2000); *Maxwell v. Illinois Cent. Gulf R.R.*, 513 So. 2d 901, 905 (Miss. 1987); *Klouse v. Northern Pac. Ry. Co.*, 312 P. 2d 647, 651 (Wash. 1957); *Ives v. New York, N.H. & H.R.R.*, 85 A.2d 902 (Conn. 1952)

This "well-settled rule not only is a common-sense recognition of how people act, it also takes into account the danger to passengers and crew inherent in emergency brake application on rapidly moving trains." *Andrews*, 882 F.2d at 710 (citations omitted).[6] In short, a plaintiff "cannot maintain a claim of failure to proceed slowly along the tracks [merely] in order to avoid the likelihood of hazards." *Bashir*, 929 F.Supp. at 412, n.5 (emphasis added). Collision must be

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6 In this case, an experienced Amtrak witness testified that people walk close or on the tracks "all the time" and that railroad workers are not always in the clear when an Amtrak train approaches but "they hear us comin' and they do get in the clear." Tr. 420, 454-55. This witness also testified about the safety concerns associated with putting a fast-moving passenger train into an emergency brake application. Tr. 447-48.

imminent.

In addition, a "specific individual hazard" must, at a minimum, be narrowly confined to when a collision is imminent so as to give necessary deference to the FRA's expressed reasoning in promulgating the maximum speed standards set forth in 49 C.F.R.§ 2139(a):

> FRA's current regulations governing train speed do not afford any adjustment of train speeds in urban settings or at grade crossings. This omission is intentional. FRA believes that locally established speed limits may result in hundreds of individual speed restrictions along a train's route, causing train delays and increasing safety hazards. The safest train maintains a steady speed. Every time a train must slow down and then speed up, safety hazards, such as buff and draft forces, are introduced. These kinds of forces can enhance the chance of derailment with its attendant risk of injury to employees, the traveling public, and surrounding communities.

FRA Track Safety Standards, 62 Fed. Reg. 102 (June 24, 1997) pp. 33998-99 (emphasis added). To permit a state common law standard that requires an engineer to slow down or stop the train before a specific collision is imminent creates the very

safety risk that the FRA was seeking to avoid when it promulgated maximum speed limits 49 C.F.R. § 213.9(a) that do not require any adjustments of train speed based on the train's particular location between stations. .

Applying the foregoing preemption legal principles to this case, the Missouri court's rulings and jury instructions clearly violated 49 U.S.C. § 20106 and *Easterwood* in two fundamental respects. First, the Missouri courts clearly should not have permitted Respondent to contend that the Amtrak train was proceeding too quickly into a protected work zone when it traveled at upwards of seventy to seventy-three miles per hour rather than only forty miles per hour. The Missouri courts improperly allowed Respondent to introduce irrelevant evidence and make highly prejudicial arguments premised on this precise contention.

The presence of that Union Pacific work crew simply cannot be the type of "specific, individual hazard" that might remove Respondent's negligence claim from the preemptive effect of 49 U.S. C. § 20106 and *Easterwood.* As the evidence at trial deomonstrated, Union Pacific work crews had been doing repair work on the tracks for months, Tr. 236, and an Amtrak witness confirmed that Amtrak engineers pass through groups of track workers under Form B protection "[a]lmost every day." Tr. 444. The mere presence of such a work crew is clearly not a transient or aberrational condition that the FRA could not have taken into account when it established a national uniform standard for train speed limits. *See, e.g., Seyler*, 102 F.Supp.2d at 1236; *Baker*, 397 F.Supp.2d at 813;

O'Bannon, 960 F.Supp. at 1420-21; *Myers*, 52 P.3d at 1026-27; *Price,* 14 P.3d at 707-08 (Utah Ct. App. 2000).

This conclusion finds specific support in a Mississippi federal district court decision which flatly rejected a plaintiff's claim that the presence of a construction work crew at a grade crossing -- a condition present at many sites -- could be deemed a specific, individual hazard. *Baker*, 397 F.Supp.2d at 813, citing *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 640 (5th Cir. 2005). Moreover, Petitioners are not aware of a single decision that supports the contrary proposition -- that the common occurrence of construction or repair workers near tracks should be considered a specific, individual hazard that removes a common law speed claim from the preclusive embrace of 49 U.S.C. § 20106.

The conclusion that federal speed preemption requirements continue to apply even when there is a work crew near the tracks is further buttressed by the FRA's promulgation of 49 C.F.R. § 213.11, which covers the restoration or renewal of track under traffic conditions. *See* A.33a. The Secretary of Transportation clearly recognized in this regulation that work crews would be restoring or renewing track "under traffic conditions" and addressed this safety issue by requiring certain "continuous supervision." The Secretary obviously could have also decided to modify maximum train speed limits in 49 C.F.R. § 213.9(a) when track restoration and renewal crews are working under traffic conditions. The Secretary did not, however, do so.

Second, the Missouri courts below also should not have

allowed Respondent to contend that Petitioners had a duty to slow down the train when the engineer first saw the work crew and equipment – *i.e.*, the moment the engineer started to blow the train horn. As noted above, a "specific, individual hazard" can only arise when there is an imminent risk of collision, *see, e.g., Baker*, 397 F.Supp.2d at 813-14; *Liboy*, 363 F.Sup.2d at 1340; *Anderson*, 327 F.Supp. at 978; *Herriman*, 883 F.Supp at 307; *Myers*, 52 P.3d at 1027-28, a principle clearly informed by the settled rule of railroad law that an engineer is entitled to assume that when he blows the train's horn, a person on the tracks up ahead will respond by removing himself from harm's way. *See* cases cited, *supra,* at 23-24. A duty to slow or stop the train should only apply -- if at all -- when it becomes clear that the individual cannot or will not remove himself from harm's way and a collision becomes imminent. The Missouri courts made no attempt to draw this important distinction by narrowly confining Respondent's contentions about train speed to a point in time after the engineer first began blowing the train's horn, when the Respondent's ongoing failure to respond to that warning made a collision imminent.

In addition, the jury instructions, which were approved by the Missouri appellate court, utterly failed to rectify the trial court's earlier disregard of applicable federal speed preemption requirements. *See* A.20a-22a. Having wrongly permitted Respondent to offer highly prejudicial evidence and argument during trial about train speed, in violation of 49 U.S.C. § 20106 and *Easterwood*, the trial court then resorted to vague jury instructions that made no attempt to correct its prior errors. *See* Instruction Nos. 6, 7 and 8, quoted *supra*, at 14-15. As a result, the jury could not possibly have understood that when

the Amtrak train entered the protected work zone, it had every legal right to proceed at seventy to seventy-five miles per hour, rather than forty miles per hour, and could not be held negligent under state common law for having done so. Nor could the jury have understood that when the engineer first saw the work crew and began blowing the train horn, he not only had every legal right to continue traveling at speeds of up to seventy to seventy-three miles per hour but also could reasonably assume that all the Union Pacific workers up ahead would get out of harm's way, at least until the moment that Respondent's lack of response to the horn indicated that a collision with Respondent was not just reasonably likely but imminent. *See Bashir*, 929 F.Supp. at 412, n.5. The court's vague jury instructions made no attempt whatsoever to provide such essential legal guidance.

The end result in this case is that Respondent was improperly allowed to prove negligence by offering highly prejudicial evidence and arguments that the Amtrak train was traveling at an excessive speed well before there was a risk of imminent collision. This is clearly in violation of the federal speed preemption requirements of 49 U.S. C. § 20106 and this Court's holding in *Easterwood*.

Accordingly, this Court should grant Petitioners' request in order to address for the first time the contours of a "specific, individual hazard" and rectify the Missouri courts' grievous mis-application of the federal speed preemption bar.

II. THE MISSOURI COURTS VIOLATED 49 U.S.C. § 20106 AND *EASTERWOOD* BY CONTENDING THAT FEDERAL SPEED PREEMPTION BARS ONLY A CLAIM BASED ON EXCESSIVE SPEED, NOT EVIDENCE AND ARGUMENT BASED ON EXCESSIVE SPEED

Petitioners need only briefly address the Missouri appellate court's puzzling argument that *Easterwood* merely requires preemption of a negligence "action" insofar as it asserts that the railroad's train was traveling at an excessive speed, rather than introduction of evidence on this subject. A.22a (quoting *Easterwood,* 507 U.S. at 676). In every court in our judicial system – federal or state – evidence is only admissible when it is relevant. Missouri is no exception. *See State v. Anderson,* 76 S.W.3d 275, 276 (Mo. 2002)(evidence must be logically and legally relevant to be admissible); *Switzer v. Switzer,* 373 S.W.2d 930, 939 (Mo. 1964) (evidence that does not tend to prove a fact in issue must be excluded because it tends to confuse the issues and prejudice the opposing party).

Since federal speed preemption precluded any claim by Respondent based on the Amtrak train's excessive speed at least up to the moment there was an imminent risk of collision, Respondent's evidence -- and his argument -- about the speed at which the Amtrak train was traveling before that moment was indisputably irrelevant as a matter of law. Yet the evidence and argument was not only permitted, the Missouri Court of Appeals relied upon it to justify Respondent's

inflammatory arguments about Petitioners' lack of corporate responsibility and concern for only profits, not safety. A.22a-23a.

This Court should not permit a state court to cavalierly undermine the federal speed preemption requirements. It should issue a writ of certiorari in order to address and correct the Missouri appellate court's tortured excuse for flouting 49 U.S.C. § 20106 and this Court's holding in *Easterwood.*

CONCLUSION

For all of the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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(212) 238-4800
Counsel for Petitioners

Dated: July 26, 2007

* Counsel of Record

APPENDIX

APPENDIX A

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

Cause No. 032-10870
Division No. 9

Curtis Burrows
Plaintiff,

vs.

Union Pacific Railroad Co. & National Railroad Passenger Corporation d/b/a/ Amtrak,
Defendants.

JUDGMENT

This action came before this Court and a Jury. The parties appeared in person and by their respective attorneys. The issues have been duly tried and the Jury rendered its verdict(s).

VERDICT

Whereas, on the claim of Plaintiff Curtis Burrows for damages, against Union Pacific Railroad Co. and Amtrak [the Jury found in favor of the Plaintiff.]

The Jury found the total damages of Plaintiff, disregarding any fault on the part of Plaintiff to be $5,000,000 Dollars and X Cents.

WHEREFORE, it is hereby ordered and adjudged that Plaintiff Curtis Burrows have and recover of Union Pacific Railroad and Amtrak $5,000,000.

[Cost of this action to be taxed against Defendants.

/s/ Nelson G. Wolff 40796
Attorney for Plaintiff, Bar #
100 South 4th Street Ste 900
Address
314 / 621-6115
Phone #

/s/ Richard E. Boyle 35059
Attorney for Plaintiff, Bar #
1010 Market St., Suite 1640, St. Louis, MO 63101
Address
618 917-9000
Phone #

So Ordered
/s/ Margaret M. Neill
Judge, Division No. 9
Judge No. 21612

Seal of the Circuit Court
IN TESTIMONY WHEREOF, I Have hereunto set my hand and affixed the seal of said Court, at office in the City of St.

Louis, this 26th day of August, 2005.

MARIANO V. FAVAZZA
Circuit Court

By: /s/ C. Hicks
Deputy Clerk

APPENDIX B

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS STATE OF MISSOURI

CURTIS BURROWS,	:	
	:	**Cause No. 032-10870**
Plaintiff,	:	
	:	**Division No. 9**
vs.	:	
	:	
UNION PACIFIC RAILROAD CO., et al.	:	
	:	
Defendants.	:	

ORDER

This cause comes before the Court on the parties' post-trial motions. The matters having been briefed and argued, the Court hereby rules as follows:

1. Defendant's Motion for New Trial is denied;

2. Plaintiff's Motion for New Trial on the Issue of Punitive Damages Only is denied;

3. Plaintiff's Motion for Court to Order Taxable Costs in Favor of Plaintiff is granted, except as to amount of

$230.00 for video taping expense of $180.00 and $50.00 relating to deposition of Jeff G. Hall, for a total amount of costs in the amount of $4,070.52, which is hereby taxed against Defendants and in favor of Plaintiff;

4. Plaintiff's Motion to Assess Prejudgment Interest and to Amend Judgment in Accordance Therewith is granted in the amount of $271,231.40, which sum shall be added to the judgment.

5. Accordingly, the judgment is hereby amended to a total sum of $5,275,301.92.

6. Pursuant to Defendants' oral motion, the Court fixes the amount of the Supersedes Bond at $6,175,000, which shall be filed in a form approved by the Court, with notice of hearing to Plaintiff, by December 21, 2005.

So Ordered,

/s/ Margaret M. Neill
Hon. Margaret M. Neill

Dated this 21st day of November, 2005

cc: Nelson G. Wolff, attorney for Plaintiff
Richard E. Boyle, attorney for Defendant

APPENDIX C

IN THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

DIVISION TWO

CURTIS BURROWS,	:	
	:	No. ED87314
Plaintiff,	:	
	:	Appeal from the Circuit
vs.	:	Court of the City of St. Louis
	:	
UNION PACIFIC RAILROAD CO. & NATIONAL RAILROAD PASSENGER CORPORATION D/B/A AMTRAK,	:	Hon. Margaret M. Neill
	:	
	:	
	x	FILED: January 23, 2007

Defendants.

Appellants, Union Pacific Railroad Company (individually "Union Pacific") and National Railroad Passenger Corporation d/b/a Amtrak (individually "Amtrak") (collectively "Defendants"), appeal from the judgment of the Circuit Court of the City of St. Louis, following a jury trial, entered in favor of Respondent, Curtis Burrows ("Plaintiff").

Plaintiff brought a Federal Employers' Liability Act ("FELA") claim against his employer, Union Pacific, and a negligence claim against Amtrak to recover damages for personal injuries he sustained after he was struck by an Amtrak train. The jury found Plaintiff's total damages to be $5 million. We affirm.

On September 23, 2003, Plaintiff, who was 44 years old, and fellow Union Pacific employees were repairing a section of track near Washington, Missouri. This section of the track was part of a double "mainline track," consisting of two parallel, adjacent tracks running east-west. Union Pacific owned both tracks and, by written agreement, permitted Amtrak to operate trains on the tracks subject to Union Pacific's control over train movement and speed. While Plaintiff and his crew repaired one track ("the track under repair"), Union Pacific permitted Amtrak to operate trains on the adjacent track ("the live track").

During the repairs, Plaintiff was working with a co-worker, Tim Miesner ("Miesner"), using a tamper. A tamper is a 75 to 80 foot long machine with two fully enclosed cabs. Plaintiff worked from one cab while Miesner worked from the other. Ordinarily, Plaintiff would be able to operate the tamper from the inside of his cab, but because a button inside the tamper for releasing clamps to lift the track did not work, Plaintiff had to exit the tamper's cab, stand between the track under repair and the live track, and manually release the clamps. Union Pacific knew about this problem with the tamper about one week before September 23 because its employees had requested that it be fixed.

The tamper approached a farm crossing and if the tamper's clamps were not released from the track, the machine

or the crossing would have been damaged. Thus, Plaintiff left the cab and manually released the tamper's clamps.

While Plaintiff was outside of the cab, an Amtrak employee radioed Miesner and told him that an Amtrak train was approaching and would soon be passing on the live track. Plaintiff did not receive the radio message because Union Pacific had not provided him with a radio device. Although Plaintiff was outside of the cab in an unsafe position, Miesner responded to the radio message and stated that the live track was clear of workers. Additionally, Miesner forgot to tell Plaintiff that the Amtrak train was approaching.

As the Amtrak train approached at a speed of 66 miles per hour, the engineer operating the Amtrak saw Plaintiff from approximately 2600 feet away because Plaintiff was wearing a bright yellow vest and helmet. The engineer sounded the train's horn, but Plaintiff could not hear the horn because the tamper was generating its own loud noise and vibrations and he was wearing ear plugs. In addition, because Plaintiff's back was to the oncoming train, he could not see it.

After the engineer saw Plaintiff, the Amtrak train accelerated from 66 miles per hour to 73 miles per hour. The Amtrak train struck Plaintiff at a speed of approximately 73 miles per hour. As a result, Plaintiff was thrown to the ground and suffered numerous physical injuries.

Following the accident, Plaintiff brought a FELA claim against Union Pacific and a negligence claim against Amtrak to recover damages for personal injuries he sustained after he was struck by the Amtrak train. Specifically, Plaintiff alleged that, as a result of Defendants' negligence, he suffered

physical injuries to his hand, shoulder, spine, hips, and legs; as well as severe pain and suffering; psychological and emotional injury; and mental anguish and anxiety. Plaintiff sought compensatory and punitive damages.

Defendants denied liability in their answer to Plaintiff's petition. As an affirmative defense, Defendants alleged that Plaintiff was contributorily negligent. Prior to trial, Union Pacific "admit[ted] liability for the negligence of its employee, [Miesner], in failing to warn [P]laintiff of the approach of the Amtrak train and admit[ted] liability for any injuries of [P]laintiff which were proximately caused by the occurrence of September 23, 2003."

The case was tried before a jury. On the third day of trial Amtrak withdrew its affirmative defense of contributory negligence. At the close of Plaintiff's case, Amtrak moved for a directed verdict to remove the issue of punitive damages, which the trial court granted. On the last day of trial, Amtrak admitted "liability for any injuries of [P]laintiff which were proximately caused by the occurrence of September 23, 2003." At the close of all the evidence, Defendants moved to "strike all the evidence that has been introduced into this case concerning the liability issues[.]" The trial court denied Defendants' motion and instructed the jury on negligence.

Thereafter, the jury returned a verdict against Defendants and found Plaintiff's total damages to be $5 million. The trial court then entered a judgment pursuant to the jury's verdict. Subsequently, Defendants filed a motion for a new trial or, in the alternative, a motion for remittitur, which the trial court denied. This appeal by Defendants followed.

Our review of a trial court's ruling denying a motion for a new trial is for abuse of discretion. Kehr v. Knapp, 136 S.W.3d 118, 122 (Mo.App.E.D. 2004). We also review a trial court's ruling denying a motion for remittitur for abuse of discretion. LaRose v. Washington University, 154 S.W.3d 365, 370 (Mo.App.E.D. 2004). Under the abuse of discretion standard, we will only reverse the trial court's decision if there is a substantial or glaring injustice. Kehr, 136 S.W.3d at 122. A trial court abuses its discretion when its ruling shocks the sense of justice, shows a lack of consideration, and is obviously against the logic of the circumstances. Payne v. Cornhusker Motor Lines, Inc., 177 S.W.3d 820, 836 (Mo.App.E.D. 2005). A trial court does not abuse its discretion if reasonable persons could differ on the propriety of the court's decision. Kehr, 136 S.W.2d at 122-23.

In their first point on appeal, Defendants argue that the trial court erred in denying their motion for a new trial because it admitted evidence concerning Defendants' negligence when "liability was unequivocally admitted by Defendants." Defendants maintain that because they admitted liability, evidence concerning their negligence was irrelevant.

Our review of a trial court's ruling regarding the admissibility of evidence is for abuse of discretion. Payne, 177 S.W.3d at 836. It is within the trial court's discretion to determine whether evidence is relevant, and we will not reverse its decision absent an abuse of that discretion. Uxa ex rel. Uxa v. Marconi, 128 S.W.3d 121, 130 (Mo.App.E.D. 2003). Evidence is relevant if it tends to prove or disprove a fact in issue or corroborates other evidence in the case. Id.

Even when a defendant makes an unqualified

admission of liability, a plaintiff has the right to introduce evidence relevant to the issue of liability. Ruppel v. Clayes, 72 S.W.2d 833, 835 (Mo.App.St.L. 1934). A defendant "cannot deprive [a] plaintiff of the right to present to the jury, in his own way, competent and relevant evidence to show all the circumstances attending [to] the accident." Id. To allow a defendant to substitute a "naked admission" for a full picture of the events may rob the evidence of much of its fair and legitimate weight. Id. at 836.

In this case, Union Pacific made a general admission of liability prior to trial. Amtrak made a general admission of liability on the last day of trial. Defendants contend that because of their admissions of liability, the trial court should not have admitted testimony concerning the project on which Plaintiff was working, the machinery involved on the project, the specific facts of the accident, Union Pacific's safety program, the speed of the train, the site of the accident, the train schedule, general safety rules, train braking, train warning devices, and the stopping capabilities of locomotives. (collectively "evidence pertaining to Defendants' negligence").

But Amtrak did not withdraw its contributory negligence affirmative defense or admit liability until after evidence pertaining to Defendants' negligence was introduced. Thus, at the time evidence pertaining to Defendants' negligence was introduced, it was relevant to prove that Amtrak had been negligent or to disprove that Plaintiff had been contributorily negligent. Furthermore, under Ruppel, Plaintiff was entitled to introduce competent and relevant evidence showing the circumstances of the accident in this case. Therefore, the trial court did not abuse its discretion in admitting evidence concerning Defendants' negligence when

liability was admitted by Defendants. Point denied.

In their second point on appeal, Defendants maintain the trial court erred in denying Defendants' motion for a new trial and motions for a mistrial because Plaintiff's counsel made inflammatory comments in closing argument.

Great deference is given to a trial court's denial of a motion for a new trial, particularly when the alleged basis for a new trial concerns comments by opposing counsel. Metro Waste Systems v. A.L.D. Services, 924 S.W.2d 335, 339-40 (Mo.App.E.D. 1996). Counsel is permitted wide latitude and discretion in referring to evidence and arguing inferences during closing argument. Nelson v. Waxman, 9 S.W.3d 601, 606 (Mo.banc 2000). We will only reverse when counsel's comments, viewed in light of the entire record, were plainly unwarranted and clearly injurious to the other party. Hemann v. Camolaur, Inc., 127 S.W.3d 706, 710 (Mo.App.W.D. 2004).

"A mistrial is a drastic remedy." Buatte v. Schnuck Markets, Inc., 98 S.W.3d 569, 575 (Mo.App.E.D. 2002). We review a trial court's ruling on a motion for a mistrial for abuse of discretion. Id.

Defendants first contend that they were entitled to a new trial or a mistrial because Plaintiff's counsel argued that Defendants had not accepted "corporate responsibility in the chain of command up at the top."

In the light of the whole record, this comment was within Plaintiff's counsel's latitude and discretion. Union Pacific knew about the problem with the tamper approximately one week before September 23 because employees had

requested that it be fixed. But because the defective tamper was not fixed by September 23, Plaintiff had to exit the tamper's cab and stand between the track under repair and the live track to do his work. In addition, although Union Pacific had the right to control the speed at which the trains traveled, it did not do so in this case, as the Amtrak train exceeded 70 miles per hour. This occurred in a construction zone where Union Pacific train speed was limited to 40 miles per hour in order to protect track worker safety.

An arguable inference from the above evidence is that Plaintiff was placed in a position of peril due to Union Pacific's failure to fix the tamper and Defendants' failure to control the speed of the Amtrak train. Thus, we cannot say that counsel's argument that Defendants had not accepted "corporate responsibility in the chain of command up at the top" was plainly unwarranted and clearly injurious to Defendants or that the trial court erred in granting Defendants' motion for a mistrial.

Defendants also argue that they were entitled to a new trial or a mistrial because Plaintiff's counsel argued that Defendants were "more concerned about their profits than they were about safety."

In the light of the whole record, this comment was within Plaintiff's counsel's latitude and discretion to argue: (1) why Amtrak's engineer, whose train was 30 minutes behind schedule, accelerated his train speed from 66 to 73 miles per hour after he saw Plaintiff on the track and (2) why United Pacific failed to provide Plaintiff with a properly functioning tamper machine. Thus, we cannot say that counsel's comment during closing argument that Defendants were "more

interested in profits than safety" was plainly unwarranted and clearly injurious to Defendants or that the trial court erred in not granting Defendants' motion for a mistrial.

Therefore, the trial court did not abuse its discretion in denying Defendants' motion for a new trial or Defendants' motions for a mistrial because of Plaintiff's counsel's comments in closing argument. Point denied.

In their third point on appeal, Defendants argue that the trial court erred in denying their motion for a new trial because the jury was improperly instructed. Defendants maintain that it was improper for the court to instruct the jury on the issue of Defendants' negligence when the Defendants had admitted liability.

Whether or not a jury was properly instructed is a question of law that we review de novo. Boggs ex rel. Boggs v. Lay, 164 S.W.3d 4, 20 (Mo.App.E.D. 2005).

Defendants contend the court erred in accepting Instruction Nos. 6 and 7 and the verdict form (collectively "Plaintiffs' submitted instructions"). Instruction No. 6 states in relevant part: "Your verdict must be for [Plaintiff] if you believe . . . [Union Pacific] [was negligent] and . . . such negligence resulted in whole or in part in injury to [P]laintiff." Instruction No. 7 states in relevant part: "Your verdict must be for [Plaintiff] if you believe . . . [Amtrak] [was negligent] and . . . such negligence resulted in whole or in part in injury to [P]laintiff." The verdict form required the jury to make a determination of whether or not each Defendant was negligent prior to reaching the issue of damages.

Defendants argue that Plaintiff's submitted instructions confused jurors as to the issues in the case because Plaintiff's instructions were focused on liability, negligence and fault, when the sole issue submitted to the jury was damages. Defendants further assert the court erred in denying their proposed Instructions A and C and their proposed verdict form ("Defendants' proposed instructions"). Defendants' proposed instructions would have instructed the jury to disregard any evidence of negligence and would have limited the jury's determination to a finding of damages only.

Plaintiff retorts that negligence was a relevant question for the jury's determination because Plaintiff rejected Defendants' admissions of liability and exercised his right to introduce evidence relevant to the issue of liability. We agree.

As discussed above in the first point on appeal, Plaintiff did not have to accept Defendants' admissions of liability and chose to introduce evidence pertaining to Defendants' negligence. Because Plaintiff introduced evidence pertaining to Defendants' negligence, the trial court did not err by instructing the jury on the issue of Defendant's negligence. Point denied.

In their fourth point on appeal, Defendants contend the trial court erred in denying their motion for a new trial because the court improperly instructed the jury on Plaintiff's common law negligence claim against Amtrak. Defendants assert the trial court erred in accepting Plaintiff's Instruction Nos. 5 and 7. Instruction No. 5 states in relevant part: "The term 'negligent' or 'negligence' as applied to [Amtrak] means the failure to use that degree of care that a very careful person

would use under the same or similar circumstances." Instruction No. 7 states in relevant part: "Your verdict must be for [Plaintiff] if you believe . . . First, [Amtrak] knew or by the use of the highest degree of care could have known that there was a reasonable likelihood of collision in time thereafter to have stopped, or slackened speed, but failed to do so[.]"

Defendants contend that the portion of Instruction No. 5 defining negligence as applied to Amtrak as "the failure to use that degree of care that a very careful person would use" imposed on Amtrak a standard of care greater than is required by law. Similarly, Defendant contends that the portion of Instruction No. 7 advising the jury that Amtrak had a duty to use "the highest degree of care" imposed on Amtrak a standard of care greater than is required by law. Neither Instruction No. 5 nor Instruction No. 7 are found in MAI.

Whether or not a jury was properly instructed is a question of law that we review de novo. Boggs, 164 S.W.3d at 20. Where the challenged instruction is not found in MAI, the instruction is proper if it follows the substantive law and can be readily understood. Rice v. Bol, 116 S.W.3d 599, 606 (Mo.App.W.D. 2003). If a jury instruction imposes on a defendant a standard of care greater than that required by the law, it is prejudicially erroneous and a reversal on appeal is mandated. Lee v. Terminal Railroad Ass'n, 669 S.W.2d 564, 566 (Mo.App.E.D.1984).

There are few situations in which a statute or the courts impose a duty to use "the highest degree of care," or "that degree of care that a very careful person would use." Syn, Inc., v. Beebe, 200 S.W.3d 122, 133 (Mo.App.W.D. 2006). Courts have most commonly imposed this heightened duty on the

operators of motor vehicles. Id. "The courts have also imposed a [heightened] degree of care on electric companies, those who use firearms, or those who handle explosives." Id.

"The degree of care required of persons having charge of locomotives . . . varies according to the circumstances of the case, and must be proportioned to the danger to be apprehended of inflicting injury upon others." Brown v. The Hannibal & St. Joseph R.R. Co., 50 Mo. 461, 467 (Mo. 1872). "At places where the railroad has no right to expect a clear track its duty is to exercise ordinary care to maintain a lookout for persons upon the track; and at all other places there is no duty on the trainmen to act until they actually see a person, a trespasser, in danger." Lee, 669 S.W.2d at 565 (wrongful death action against railroad after train stuck and killed child who was lying between rails on railroad track) (quoting Coonce v. Missouri Pacific Railroad Company, 358 S.W.2d 852, 854 (Mo. 1962) (personal injury action against railroad after train struck and injured plaintiff who was sleeping on railroad track)). The issue in Lee and Coonce was whether a defendant-railroad has the duty to exercise either ordinary care or the highest degree of care in *keeping a lookout* for persons on railroad tracks. Lee, 669 SW.2d at 565; Coonce, 358 S.W.2d at 854.

In contrast, the issue in this case is whether a defendant-railroad has the duty to exercise the highest degree of care once the engineer *actually sees* a person on the railroad tracks and has an opportunity to slow down or stop the train. We find that under these circumstances more than ordinary care is required; rather, the highest degree of care is required. Therefore, we hold that a railroad has the duty to exercise "the highest degree of care," or "that degree of care that a very

careful person would use," once the engineer actually sees a person on the railroad tracks and has an opportunity to slow down or stop the train.

Because the jury instruction did not impose on the railroad a standard of care greater than that required by the law, it was not prejudicially erroneous. Point denied.

In their fifth point on appeal, Defendants assert the trial court erred in denying their motion for a new trial because it admitted "expert" opinion testimony from Scott Kenner ("Kenner"), an Amtrak employee and lay witness, on an ultimate issue in the case.

Our review of a trial court's ruling regarding the admissibility of evidence is for abuse of discretion. Payne, 177 S.W.3d at 836. An expert may render an opinion as to an ultimate issue in a case. Mohr v. Mobley, 938 S.W.2d 319, 322 (Mo.App.W.D. 1997). In contrast, a lay witness usually cannot render an opinion as to the ultimate issue in a case. Id. A party who raises a subject waives the right to challenge further evidentiary development of that subject. Turnbo by Capra v. City of St. Charles, 932 S.W.2d 851, 857 (Mo.App.E.D. 1996). A party cannot prove prejudice when the admission of the evidence is cumulative of other properly admitted evidence. Metro, 924 S.W.2d at 338.

Defendants first contend that Plaintiff's counsel improperly obtained opinions and testimony from Kenner as to whether Amtrak's conduct was "in conscious disregard" of Plaintiff's safety.

Although Plaintiff's counsel asked Kenner whether

Amtrak's crew had consciously disregarded Plaintiff's safety, the court sustained Defendants' objection. Kenner did not testify on the issue of whether Amtrak consciously disregarded Plaintiff's safety. Consequently, the trial court did not err in admitting non-existent testimony.

Defendants also contend that Plaintiff's counsel improperly obtained opinions and testimony from Kenner on "the legal duty and responsibility of Amtrak." Specifically, Plaintiff's counsel asked Kenner whether Amtrak recognized that it has the responsibility to protect individuals from being struck by their trains. Kenner answered in the affirmative.

Assuming, *arguendo*, that Kenner's testimony constitutes a lay witness rendering an opinion as to the ultimate issue in a case, Defendants had previously raised the subject of Amtrak's responsibility earlier in the trial, when Defendants' counsel asked a Union Pacific employee about Amtrak's responsibility to others. Because Defendants raised the subject of Amtrak's responsibility, they waive the right to challenge further evidentiary development of that subject.

Moreover, Kenner had testified earlier that Amtrak has a responsibility to ring the bell and blow the whistle when approaching workers on the track. Thus, Defendants cannot establish prejudice, in that Kenner's testimony is cumulative of other properly admitted evidence.

Therefore, the trial court did not abuse its discretion in admitting Kenner's testimony regarding Amtrak's responsibility because Defendants raised this subject and because Defendants cannot establish prejudice. Point denied.

In their sixth point on appeal, Defendants claim the trial court erred in denying their motion for a new trial because the court improperly allowed testimony and instructed the jury concerning the Amtrak train's speed.

We first address Defendant's contention that the trial court erred in submitting Instruction Nos. 7 and 8. Whether or not a jury was properly instructed is a question of law that we review de novo. Boggs, 164 S.W.3d at 20.

Submission of a claim in a verdict director that allows the jury to find a defendant liable if it found that the train was operating an excessive speed is preempted by federal law and fails to state a claim. Griffin v. Kansas City Southern Ry. Co., 965 S.W.2d 458, 460 (Mo.App.W.D. 1998). But a claim that a train failed to slacken its speed in response to a specific, individual hazard is not preempted by federal law and is cognizable. Id. at 460-61. A "specific, individual hazard" includes a person standing on a railroad track. Alcorn v. Union Pacific R.R. Co., 50 S.W.3d 226, 242 (Mo.banc. 2001) (citing Bashir v. National Railroad Passenger Corp., 929 F. Supp. 404, 412 (S.D. Fla. 1996)). A proper verdict director must set forth the specific individual hazard. See Griffin, 965 S.W.2d at 460. A verdict director is incorrect if it permits the jury to find the defendant liable merely for traveling too quickly considering the time and the place. Id. at 461.

In this case, Instruction No. 7 states:

Your verdict must be for [Plaintiff] if you believe:

> First, [Amtrak] knew or by the use of the highest degree of care could have known that there was a

> reasonable likelihood of collision in time thereafter to have:
>
> stopped, or
>
> slackened speed,
>
> but failed to do so; and
>
> Second, [Amtrak] was thereby negligent, and
>
> Third, such negligence directly caused or directly contributed to cause damage to [Plaintiff].

Instruction No. 8 states: "The speed of the Amtrak train in this case is governed by federal regulations. You are instructed that the train in this case was operating within that speed limit. . . . The only claim you can consider against [Amtrak] is contained in Instruction No. 7."

Apparently Defendants contend that the combined language of Instruction Nos. 7 and 8 is erroneous because it allows the jury to believe that the Amtrak train's speed could play a role in their verdict, even though the Amtrak train's speed was preempted by federal regulations. But because Plaintiff's claim was that the Amtrak train failed to stop or slacken its speed in response to a specific, individual hazard, i.e. Plaintiff, this claim is not preempted by federal law and is cognizable.

Moreover, because Instruction No. 7 required the jury to find that (1) Amtrak knew or could have known that there was a reasonable likelihood of collision and (2) that Amtrak's

negligence directly caused or contributed to cause damage to Plaintiff, this instruction adequately sets forth Plaintiff as the specific, individual hazard, as it was uncontroverted that Plaintiff was standing on the railroad tracks at the time of the collision with the Amtrak train. Furthermore, Instruction No. 7 does not permit the jury to find Amtrak merely liable for traveling too quickly considering the time and the place. Thus, the trial court did not err in submitting Instruction Nos. 7 and 8.

We will now review Defendant's contention that the trial court erred in allowing testimony concerning train speed. Our review of a trial court's ruling regarding the admissibility of evidence is for abuse of discretion. Payne, 177 S.W.3d at 836.

Defendants assert that because there is no question that the Amtrak train was traveling within the proper speed limit at the time of the incident, evidence of speed is specifically preempted by federal law, citing CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993). But CSX merely holds that federal law preempts a state common law "negligence *action* only insofar as it asserts that [a defendant's] train was traveling at an excessive speed." 507 U.S. at 676 (emphasis added). Thus, Defendants contention is without merit because Defendants do not cite any authority for the proposition that federal law preempts *evidence* of train speed. Defendants' contention also lacks merit because, as discussed above, Plaintiff's claim that the Amtrak train failed to stop or slacken its speed in response to a specific, individual hazard is cognizable and does not infringe on federal regulations.

Therefore, the trial court did not err by admitting

testimony and instructing the jury concerning the Amtrak train's speed. Point denied.

In their seventh point on appeal, Defendants maintain the trial court erred in denying their motion for a new trial because the court admitted testimony regarding Amtrak's surveillance of Plaintiff.

A party will only prevail on a claim of error concerning the admission of evidence if the party shows prejudice. Goede v. Aerojet General Corp., 143 S.W.3d 14, 19 (Mo.App.E.D. 2004). Allegations of prejudice must be more than mere conclusory allegations. See id. In this case, the only portion of testimony cited by Defendants is one page of the transcript, where Plaintiff's counsel asked Jeannine Dearlove ("Dearlove"), a representative of Amtrak: "[I]sn't it true that you were the Amtrak person . . . who made the decision to order undercover secret surveillance on [Plaintiff] and his family?" Dearlove responded, "I hired an investigator to look at [Plaintiff's] activities."

Defendants claim that the above testimony was prejudicial because its only purpose was "to inflame the passion of the jury by claiming that [P]laintiff was subjected to an invasion of his privacy by the individual performing the surveillance." Because we find that Defendants' allegation of prejudice is merely conclusory, Defendants have not shown prejudice. Therefore, the trial court did not abuse its discretion in admitting testimony regarding Amtrak's surveillance of Plaintiff. Point denied.

In their eighth point on appeal, Defendants assert the trial court erred in denying Defendant's motion for a new trial

because the court excluded testimony from Steve Rowe ("Rowe"), a Union Pacific employee, that the average retirement age of Union Pacific machine operators was between 61 and 62 years old. The trial court sustained Plaintiff's objection to this testimony, which was based, in part, on relevancy. Defendants contend that Rowe's testimony was relevant to the issue of damages. Additionally, Defendants argue that they should have been allowed to present Rowe's testimony as rebuttal to Plaintiff's testimony that he had planned to retire at the age of 67.

It is within the trial court's discretion to determine whether evidence is relevant, and we will not reverse its ruling absent an abuse of that discretion. Uxa, 128 S.W.3d at 130. Evidence is relevant if the evidence offered tends to prove or disprove a fact in issue or corroborates other evidence in the case. Id.

In this case, Plaintiff testified that he had planned to retire at the age of 67, when his wife would be 62, so that they could retire together. Plaintiff's retirement plans affected how many years of earnings would be included in future wage loss calculations, and thus, were relevant to the calculation of Plaintiff's economic damages. During Defendants' offer of proof, Rowe stated that he could only testify regarding the average retirement age of other, unnamed, former employees with circumstances dissimilar to Plaintiff. Because Rowe's testimony that the average retirement age of Union Pacific machine operators is between 61 and 62 years old would not prove or disprove when Plaintiff himself planned to retire, it was not relevant to the calculation of Plaintiff's economic damages. Therefore, the trial court did not abuse its discretion in excluding Rowe's testimony. Point denied.

In their final point on appeal, Defendants contend that the trial court abused its discretion in failing to remit Plaintiff's damages to an amount less than $5 million. Defendants assert that the non-economic portion of Plaintiff's damages is grossly disproportionate to the economic portion.

We will only interfere with the trial court and jury's judgment when the size of the verdict is manifestly unjust. Alcorn, 50 S.W.3d at 249-250. In determining whether a verdict is manifestly unjust, we view the evidence in the light most favorable to the verdict. Id. at 250.

Remittitur is appropriate where the jury's verdict is excessive. Id. at 249. A jury's verdict is excessive when it exceeds fair and reasonable compensation for the plaintiff's damages. Id. at 250. We defer to the trial court's decision whether or not to remit a verdict because the trial court is in a superior position to observe the witnesses, including the plaintiff. Id. In Alcorn, the Missouri Supreme Court upheld a $25 million award in compensatory damages, even though it reflected a ratio of non-economic to economic damages of 11.5 to 1, noting there is no bright line test or formula in computing a plaintiff's non-economic losses. Id. at 250, n.24.

In this case, the jury's verdict was for $5 million in compensatory damages. Viewing the record in the light most favorable to Plaintiff, about $3.8 million of this award is non-economic and about $1.2 million is economic. These figures reflect an approximate ratio of non-economic to economic damages of 3.5 to 1, much less than the ratio in Alcorn.

Because we defer to the trial court's decision and

because we find no basis for overturning the trial court and jury's judgment, the trial court did not abuse its discretion in denying Defendants' motion for remittitur. Point denied.

Based on the foregoing, we affirm the trial court's judgment.

/s/ Gary M. Gaertner
Gary M. Gaertner, Sr., Judge

George W. Draper III, P.J., Concurs
Robert G. Dowd, Jr., J. Concurs

APPENDIX D

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

TO: Attorneys of Record

FROM: Laura Thielmeier Roy, Clerk

DATE: March 6, 2007

RE: Motions For Rehearing And/Or Transfer to Supreme Court Denied

1. ED87314 CURTIS BURROWS, RES V UNION PACIFIC RR, APP

2. ED87351 STATE OF MISSOURI, RES V RAINEY EDDIE GREGORY, APP

3. ED87592 REGINALD WESTFALL, APP V STATE OF MO, RES

4. ED87870 CHRIS FRANCIS, APP V MEHLVILLE FIRE PROT DIST, RES

5. ED87815 STATE OF MISSOURI, RES V THOMAS EDWARD LANG, APP

APPENDIX E

IN THE SUPREME COURT OF MISSOURI
SC88395
ED87314

May Session, 2007

Curtis Burrows,
Respondent,

vs. (TRANSFER)

Union Pacific Railroad
Company and National Railroad
Passenger Corporation d/b/a
Amtrak,
Appellants,

Now at this day, on consideration of the appellants' application to transfer the above-entitled cause from the Missouri Court of Appeals, Eastern District, it is ordered that the said application be, and the same is hereby denied.
STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session, 2007, and on the 1st day of May, 2007, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 1st day of May, 2007.

/s/ Thomas F. Simon Clerk

_____ D.C.

APPENDIX F

49 USCS § 20106

§ 20106. National uniformity of regulation

Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue to in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue to in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order - -

(1) is necessary to eliminate or reduce an essentially local safety or security hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government, and

(3) does not unreasonably burden interstate commerce.

49 CFR 213.9

§ 213.9 Classes of track: operating speed limits.

(a) Except as provided in paragraph (b) of this section and §§ 213.57(b), 213.59(a), 213.113(a), and 213.137(b) and (c), the following maximum allowable operating speeds apply - -

[In miles per hour]

Over track that meets all of the requirements prescribed in this part for - -	The maximum allowable operating speed for freight trains is - -	The maximum allowable operating speed for passenger trains is - -
Excepted track	10	N/A
Class 1 track	10	15
Class 2 track	25	30
Class 3 track	40	60
Class 4 track	60	80

Class 5 track	80	90

(b) If a segment of track does not meet all of the requirements for its intended class, it is reclassified to the next lowest class of track for which it does meet all of the requirements of this part. However, if the segment of the track does not at least meet the requirements for Class 1 track, operations may continue at Class 1 speeds for a period of no more than 30 days without bringing the track into compliance, under the authority of a person designated under § 213.7(a), who has at least one year of supervisory experience in railroad track maintenance, after that person determines that operations may safely continue and subject to any limiting conditions specified by such person.

49 CFR 213.11

§ 213.11 Restoration or renewal of track under traffic conditions.

If during a period of restoration or renewal, track is under traffic conditions and does not meet all of the requirements prescribed in this part, the work on the track shall be under the continuous supervision or a person designated under § 213.7(a) who has at least one year of supervisory experience in railroad track maintenance, and subject to any limiting conditions specified by such person. The term "continuous supervision" as used in this section means the physical presence of that person at a job site. However, since the work may be performed over a large area, it is not necessary that each phase of the work be done under the visual supervision of that person.